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Trade Preferences and LDCs: Less Executive Discretion and More Congressional Direction: Florsheim Shoe Co. v. United States

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TRADE PREFERENCES AND LDCs: LESS EXECUTIVE DISCRETION AND MORE CONGRESSIONAL DIRECTION: *FLORSHEIM SHOE CO. v. UNITED STATES*

Generalized Systems of Preferences (GSP)[1] are preferential tariff schemes instituted by industrialized nations to promote and accelerate the economic development of lesser developed countries (LDCs)[2] through industrial diversification and increased export

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[1] *See* UNCTAD Doc. TD/B/330 (1970). Generalized Systems of Preferences (GSP) are designed to grant trade concessions to lesser developed countries (LDCs) to enable them to compete in world export markets. *See* Berger, *Preferential Trade Treatment for Less Developed Countries: Implications of the Tokyo Round*, 20 HARV. INT'L L.J. 540, 541 (1979). Prior to the establishment of preferential treatment for their manufactured exports, the LDCs were faced with the traditional tariff protections practiced by the industrialized countries which discouraged the development of export-oriented industries. *See* A. YUSUF, LEGAL ASPECTS OF TRADE PREFERENCES FOR DEVELOPING STATES 19 (1982). Tariff rates imposed by developed countries increase with the degree of product sophistication; either no tariff or a very low one is placed on raw materials and primary goods such as minerals and timber. *See* Benham, *Development and Structure of the Generalized System of Preferences*, 9 J. WORLD TRADE L. 442, 443 (1975). The effect of these tariff structures is to discourage developing countries from industrializing. *Id.*

Although the theory of preferential treatment for industrial exports of developing countries dates back to the 18th century when Alexander Hamilton proposed preferences for the United States, which was then an LDC, *see id.* at 442, the first formal GSP proposal was not made until 1964 in an address to the first United Nations Conference on Trade and Development (UNCTAD); *see* Graham, *The U.S. Generalized System of Preferences for Developing Counties: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513, 514 (1978). It was proposed that the developed nations grant temporary duty-free treatment to products from LDCs, thus facilitating the development of export markets for the LDCs. *Id.* at 515. The GSP was formerly adopted by the industrialized nations as a voluntary program during the Tokyo Round of the General Agreement on Tariffs and Trade (GATT) negotiations in 1971. *See id.* at 519. *See generally* GATT Doc. L/3545 (1971), *reprinted in* General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents, Supp. No. 18 at 24 (1972) (GSP was passed as waiver to Most Favored Nations structure of GATT). For a discussion of GSP and the latest round of GATT negotiations see Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153, 170-71 (1979) [hereinafter cited as *Tokyo Round*]; *see also* Meier, *The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries*, 13 CORNELL INT'L L.J. 239, 244-55 (1980) (discussion of benefits and failures from LDC viewpoint). Each nation formulates its own GSP plan. For a general discussion of the GSP schemes of specific industrialized nations, see A. YUSUF, *supra*, at 120-42.

[2] *See* P. PALMEDO, R. NATHANS, E. BEARDSWORTH & S. HALE, ENERGY, NEEDS, USES AND RESOURCES IN DEVELOPING COUNTRIES 13 (1978) [hereinafter cited as P. PALMEDO & R. NATHANS]. LDCs are a disparate group of nations in varying stages of development. *Id.* The

earnings.[3] The United States GSP, a vital part of the Trade Act of 1974 (Trade Act),[4] grants the President the discretion to authorize

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industrialized developing countries are those in which industrial activity contributes more to gross domestic product than to agricultural activity. *Id.* at 15. Because of their production capacities, these advanced LDCs benefit the most from GSP programs. *See* Benham, *supra* note 1, at 452; Lahoud, *The "Non-Discriminatory" United States Generalized System of Preferences: De Facto Discrimination Against the Least Developed Developing Countries*, 23 HARV. INT'L L.J. 1, 1-2 (1982); *see also* P. PALMEDO & R. NATHANS, *supra*, at 14-19 (categorization of developing countries by level of economic development).

[3] *See* Graham, *supra* note 1, at 513. "Trade instead of aid" was the theme underlying the adoption of preferential tariff structures for imports from developing countries. *Id.*; *see* S. REP. No. 1298, 93rd Cong., 2d Sess., (1974) (LDC development would be stimulated through "trade rather than aid"), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7199 [hereinafter cited as S. REP. No. 1298]. It has been proposed that trade preferences are a better means to stimulate growth in the economies of LDCs than are traditional aid programs. *See* Berger, *supra* note 1, at 541; *see also* E. ROSSIDES, U.S. CUSTOMS TARIFFS AND TRADE 231 (1977) (GSP is a "world-wide" effort to help LDCs "grow industrially, agriculturally, and commercially"); Graham, *supra* note 1, at 513 (GSP proponents believe that by increasing their exports, LDC economies will diversify). It is submitted that by using trade concessions instead of traditional aid schemes, the developed nations are promoting development that is compatible with "free world" ideals in an efficient manner.

Aside from promoting industrial development, granting tariff preferences to LDCs can also stimulate foreign investment. Since a GSP cuts tariffs on goods that LDCs can produce, foreign entrepreneurs are more likely to invest in export-oriented industries. Promfret, *Trade Preferences and Foreign Investment in Malta*, 16 J. WORLD TRADE L. 236, 247 (1982). Although one of the major goals in GSP programs is to diversify LDC economies, in fact, the opposite effect may result due to foreign investment in LDC export industries. *See, e.g.*, Promfret, *supra*, at 247-48. In Malta, for example, investment has been exclusively in the clothing industry, causing the structure of development to center around clothing manufacturing, despite the policy of the Maltese Government and GSP goals of industrial diversification. *Id.*

[4] Trade Act of 1974, Pub. L. No. 93-618, tit. V, §§ 501-505, 88 Stat. 1978, 2066-71 (codified as amended at 19 U.S.C. §§ 2461-2465 (1982)) [hereinafter cited as Trade Act]. *See generally*, Note, *The Generalized System of Preferences: Nations More Favored Than Most*, 8 LAW & POL'Y INT'L BUS. 783, 783-85 (1976) (discussion of implementation of United States GSP). The United States GSP became effective on January 3, 1975, making the United States the last developed nation to adopt a GSP. Nemmers & Rowland, *The U.S. Generalized System of Preferences: Two Much System, Too Little Preference*, 9 LAW & POL'Y INT'L BUS. 855, 855 (1977); *see also* Exec. Order No. 11,888, 40 Fed. Reg. 55,276 (1975) (implementing the U.S. GSP).

The Trade Act was enacted to give multilateral trade negotiators the authority to reduce tariffs in order to obtain reciprocity for American products and to assure collective economic stability. *See* S. REP. No. 1298, *supra* note 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7199. This was accomplished by granting the President the authority to adjust the tariff structures of the United States and to provide import relief to domestic industry when necessary to achieve certain economic goals. *See* R. STRUM, CUSTOMS LAW AND ADMINISTRATION § 61.2, at 712 (1980).

The GSP provisions, Title V of the Trade Act, actually are a temporary system of tariff preferences, 1 P. FELLER, U.S. CUSTOMS AND INTERNATIONAL TRADE GUIDE § 11.07[1], at 11-29 to 11-30 (1984), with a duration of 10 years from the date of enactment of the Trade Act, January 3, 1975, *see* 19 U.S.C. § 2465(a) (1982).

duty-free entry of eligible articles imported directly from developing countries.[5] This broad grant of authority to the President[6] is

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[5] 19 U.S.C. §§ 2461-2463 (1982). Section 2461 provides in pertinent part:

> The President may provide duty-free treatment for any eligible article from any beneficiary developing country . . . .

Id. § 2461. The President selects which articles will receive preferential treatment in the same fashion as he designates beneficiary countries. *See id.* § 2462; *see also* Godchaux-Henderson Sugar Co. v. United States, 496 F. Supp. 1326, 1328 (Cust. Ct. 1980) (President may grant duty-free treatment to eligible articles designated by him). Although the Trade Act gives the President discretion in designating articles, *see* E. ROSSIDES, *supra* note 3, at 233, the statute specifically excludes certain "import-sensitive" articles from eligibility, 19 U.S.C. § 2463(c)(1) (1982). These excluded goods include textile and apparel articles, watches, certain electronic, steel, and footwear articles, some glass products, and any other import-sensitive article so determined by the President. *See id.*

The United States' GSP plan includes over 2700 items regularly subject to tariffs and applies only to imports received directly from LDCs. *See* G. HUFBAUER, A. LOEWINGER & P. MEYES, SURVEY OF THE EFFECTS OF U.S. TRADE POLICY INSTRUMENTS V-1 (1982) [hereinafter cited as SURVEY]; E. ROSSIDES, *supra* note 3, at 323. The criteria for product eligibility are: (1) products must be imported directly from a beneficiary LDC; (2) products should be wholly produced or manufactured in the LDC, or not less than 35% of the appraised value must be added in the LDC (value-added rule); and (3) LDC articles which are products of members of free trade associations may benefit from GSP if not less than 50% of the value is added in two or more member countries. *See* 19 U.S.C. § 2463(b) (1982); *see also* E. ROSSIDES, *supra* note 3, at 237-42 (explanation of eligibility criteria); Nemmers & Rowland, *supra* note 4, at 870, 880 (discussion of article eligibility). Duty-free treatment may be withdrawn by the President. *See* 19 U.S.C. § 2464 (1982); *infra* notes 18-19. Rather than prescribe a definition or a definitive list of eligible LDCs, Congress provided certain criteria for determining which countries would be designated as beneficiary developing countries. *See* S. REP. NO. 1298, *supra* note 3, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS at 7349. In determining whether a country is eligible, the President is directed to consider the following:

> (1) an expression by such country . . . to be so designated;
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> (2) the level of economic development of such country, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors . . . ;
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> (3) whether . . . other major developed countries are extending [GSP] treatment to such country; and
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> (4) [assurances by the LDC that] it will provide equitable and reasonable access to [its] markets and basic commodity resources.

19 U.S.C. § 2462(c) (1982). The President designates a beneficiary developing country by Executive Order after first notifying the House and Senate of both his reasons and intentions to do so. *Id.* § 2462(a)(1); *see, e.g.*, Exec. Order No. 12,204, 45 Fed. Reg. 20,704 (1980) (designating Ecuador, Indonesia, Uganda, and Venezuela as beneficiary developing countries).

[6] 19 U.S.C. § 2464(a) (1982). Section 2464(a) provides in pertinent part:

> The President may withdraw, suspend, or limit the application of the duty-free treatment . . . to any article or with respect to any country.

Id. Pursuant to this statute, the President may add new products to the GSP list, remove items from eligibility, and redesignate country eligibility for duty-free treatment once the country can compete in international markets. *See Operation of the "U.S. Generalized System of Preferences" Under Title V of the Trade Act of 1974: Hearing Before the Subcomm.*

limited only by congressionally imposed procedural requirements that compel consideration of certain enumerated factors.[7] While the Court of International Trade has exclusive jurisdiction over actions arising under the Trade Act,[8] the Court has only a limited capacity to review executive determinations made in administering the GSP.[9] The extent of the Court's power to review executive discretion is illustrated in two recent decisions, *Florsheim Shoe Co. v. United States*[10] and *West Bend Co. v. United States*.[11]

In *Florsheim*, the plaintiff, a domestic manufacturer of shoes,[12] commenced an action seeking review of a denial by the United States Customs Service[13] of a petition requesting duty-free treatment of certain imported leathers from India.[14] Based on a

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on Trade of the House Comm. on Ways and Means, 96th Cong., 2d Sess., 18 (1980) [hereinafter cited as *GSP Hearings*] (statement of Doral Cooper, Deputy Assistant United States Trade Representative).

Broad grants of authority to the President are common in the field of international trade. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 324 (1936) (common practice to leave foreign affairs to sole discretion of President); J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (Congress has power to authorize President to equalize difference in cost of production in U.S. with competing foreign countries); Field v. Clark, 143 U.S. 649, 692-93 (1892) (President may suspend duty-free entry of goods when deemed that foreign country is not reciprocating in trade relations and where Congress determined suspension should take effect upon President's determination).

[7] *See, e.g.*, 19 U.S.C. § 2462(c) (1982) (congressionally-mandated factors that President must consider in designating a beneficiary LDC); 19 U.S.C. § 2462(a)(1) (1982) (before President designates any LDC he must notify Congress and reveal considerations involved in decision).

[8] *See* 28 U.S.C. § 1581(i) (1982). Section 1581(i) provides in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.

Id. It has been suggested that, by requiring parties in international trade suits to seek relief in the Court of International Trade, consistent application of the trade laws will be ensured. Re, *Litigation Before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 443 (1981).

[9] *See* Florsheim Shoe Co. v. United States, 570 F. Supp. 734, 743 (Ct. Int'l Trade 1983) (discussion of court's scope of review), *aff'd*, 744 F.2d 787 (Fed. Cir. 1984); *infra* notes 36-37.

[10] 570 F. Supp. 734 (Ct. Int'l Trade 1983), *aff'd*, 744 F.2d 787 (Fed. Cir. 1984).

[11] 576 F. Supp. 630 (Ct. Int'l Trade 1983).

[12] 570 F. Supp. 736.

[13] *Id.* The United States Customs Service, an agency of the Treasury Department, is charged with the administration and enforcement of the customs law. E. ROSSIDES, *supra* note 3, at 31. The International Trade Commission (ITC), on the other hand, is responsible for researching and reporting the effects of duties and imports on the domestic economy. *Id.* at 32.

[14] 570 F. Supp. at 736. Request for review of GSP status may be made by a foreign

finding by the United States Trade Representative[15] that similar or directly competitive articles were produced by domestic industry,[16] the President removed Indian water buffalo and other leathers from GSP eligibility in 1977.[17] Florsheim alleged that the Trade Representative's classification was erroneous, and, thus, the President's application of the competitive needs formula was erroneous as well.[18] The water buffalo leather, Florsheim claimed, fell within an exception to the statutory needs limitation.[19]

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government or any "interested party." 15 C.F.R. § 2007.0(a) (1982).

[15] 570 F. Supp. at 736. The Office of the United States Trade Representative, which is part of the Customs Service, was delegated certain functions under the Trade Act of 1974, including responsibility for the administration of the GSP. *See* Exec. Order No. 11,846, 40 Fed. Reg. 14,291 (1975), *reprinted in* 15 C.F.R. 469, 471 (1983). The Trade Representative has published guidelines for reviewing the eligibility of an article prior to designation or removal of GSP goods by the President. 15 C.F.R. §§ 2007.0-2007.8 (1983); *see* Graham, *supra* note 1, at 533-34.

> A domestic or foreign manufacturer or foreign government may request: (1) that additional articles be designated as eligible for the GSP; or (2) that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited. . . .

15 C.F.R. § 2007.0(a) (1983); *see also id.* § 2007.1 (specific guidelines for contents of GSP review requests).

The findings and recommendations of the Trade Representative made in connection with administering the GSP are not reviewable. *See Florsheim*, 570 F. Supp. at 746.

[16] 570 F. Supp. at 736.

[17] *Id.*

[18] *Id.* at 738. Application of the competitive needs formula requires the mandatory removal of articles in two instances: when a beneficiary LDC's exports of a particular good exceed either a specified dollar amount, *see* 19 U.S.C. § 2464(c)(1)(A) (1982), or when a beneficiary LDC's exports of a particular good exceed 50% of the total United States importation of that good in the previous year, *see id.* § 2464(c)(1)(B). Section 2464(c)(1)(A) provides that the President *must* remove an article from GSP treatment when a particular LDC:

> has exported (directly or indirectly) to the United States during a calendar year a quantity of an eligible article having an appraised value in excess of an amount which bears the same ratio to $25,000,000 as the gross national product of the United States for the preceeding calendar year . . . bears to the gross national product of the United States for . . . 1974 . . . .

19 U.S.C. § 2464(c)(1)(A) (1982). It should be noted that the statute provides for a dynamic dollar value limit for importation of an eligible good from an LDC based on domestic GNP in 1980. *See* P. FELLER, *supra* note 4, at 11-34 n.35.1; *see also* Berger, *supra* note 1, at 544 (dollar value ceiling equals twenty-five million dollars plus a yearly growth adjustment increment). The limit according to this formula was $45,822,612.

[19] 570 F. Supp. at 738. Plaintiffs alleged that the Trade Representative erred in applying the competitive needs formula to the Indian leathers. *Id.* Florsheim contended that since imports that are not "like or directly competitive" with domestically-manufactured goods are not subject to competitive needs limitations, the application of the formula in this case was erroneous. *Id.*; *see* 19 U.S.C. § 2464(d) (1982). Section 2464(d) provides that:

> Subsection (c)(1)(B) of this section does not apply with respect to any eligible

Writing for the Court, Judge Newman concluded that the administrative decision classifying the leathers as non-eligible goods was not reviewable.[20] After dispensing with the issue of plaintiff's standing,[21] the Court addressed whether the President's action was *ultra vires*.[22] Judge Newman examined the interdependence of sections 504(a) and 504(c)(1)(B) of the Trade Act, and reasoned that because of the broad discretionary authority accorded by the former section, a Presidential determination made pursuant to the competitive needs formula of section 504(c)(1)(B) does not preclude action pursuant to section 504(a).[23] The Court then considered whether section 504(a) authorized the Executive Order that withdrew the preferential treatment of the leathers.[24] Concluding

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> article if a like or directly competitive article is not produced on January 3, 1975, in the United States.

19 U.S.C. § 2464(d) (1982). Thus, even if an article imported from a specific LDC represented more than the competitive limitation ceilings, it would still be entitled to duty-free treatment if the United States did not produce a directly competitive product. *See* S. REP. No. 1298, *supra* note 3, at 7217.

[20] *See* 570 F. Supp. at 740.

[21] *See id.* at 737-38. The defendant alleged that as a domestic manufacturer, Florsheim lacked standing to seek review of the President's action. *Id.* at 737. The defendant contended that only domestic companies producing goods competitive with GSP imports could bring an action under the GSP limitation sections. *Id.*; *see also* 19 U.S.C. § 2464(c)(1)(B),(d) (1982) (GSP limitation sections). The court summarily disposed of the standing issue by holding that Florsheim, as an importer and "ultimate consignee of the goods in question," could commence an action in the Court of International Trade. *See* 570 F. Supp. at 737-38, pursuant to 28 U.S.C. § 2631(a). Section 2631(a) provides in pertinent part:

> A civil action contesting the denial of a protest, in whole or in part, under . . . the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest . . . .

28 U.S.C. § 2631(a) (1982). Since Florsheim qualified as an "interested party" in GSP status petitions, and since its petitions for review were denied, Florsheim had standing to bring the action. 570 F. Supp. at 738.

[22] *See* 570 F. Supp. at 738.

[23] *See id.* at 739. Addressing the President's discretionary authority under 19 U.S.C. § 2464(a), *see supra* note 6 and accompanying text, Judge Newman perceived that Congress intended to "grant the President broad discretion in the administration of the GSP," 570 F. Supp. at 741. Therefore, since the President's denial of duty-free treatment for the leathers was made pursuant to the authority vested in him by subsections 2464(a) and (c), *see id.* at 739, the court was able to consider the government's case under these broad discretionary provisions, *id.*

[24] *See* 570 F. Supp. at 739. The court noted that the Executive orders announcing the withdrawal of preferential treatment of the leathers were predicated on subsections 2464(a) and 2464(c)(1)(B). *See id.*; *supra* note 18. Where an LDC meets the limitations of § 2464(c) for a particular import, the President is compelled to remove the LDC from GSP eligibility for that item for the next year. 19 U.S.C. § 2464(c) (1982); *see supra* note 18. Florsheim alleged that the President's application of the competitive needs formula was unwarranted, 570 F. Supp. at 738; *see supra* note 19 and accompanying text, but the court observed that

that Congress intended to grant the President broad discretion, Judge Newman upheld the President's determination, stating that the withdrawal of duty-free treatment falls within the ambit of 504(a), and thus comports with the competitive needs formula.[25] On appeal, Judge Davis, writing for the Federal Circuit panel concluded that the discretion granted to the President by 504(a) is so broad that a consideration of the competitive needs formula was not necessary.[26]

Additionally, the Court considered the permissible scope of review of the President's action.[27] In this regard, Judge Newman held that where the President acts pursuant to congressionally delegated authority, courts will not scrutinize the President's motives, reasoning, judgment, or findings of fact except to determine proper statutory construction, conformance with procedural requirements, and whether the action was within the delegated authority.[28] To hold otherwise, the Court postulated, would "amount to a clear invasion of the legislative and executive domains."[29] Thus, the Court held that the findings of fact of the Trade Representative—relied upon by the President—were not subject to judicial review.[30]

In *West Bend*, the plaintiffs challenged the President's removal from GSP eligibility of hot-air corn poppers imported from Hong Kong.[31] In ordering the removal, the President relied solely on section 504(c), which requires the President to delete an LDC item from the list of eligible goods when certain conditions are

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by acting under § 2464(c)(1)(B), the President was not precluded from acting under § 2464(a), 570 F. Supp. at 739. The Executive order that withdrew the leathers from duty-free treatment cites both sections as authority for the President's action. *Id.* Therefore, the court reasoned, the President's action fell under the broad grant of authority and discretion of section 2464(a). *See id.* The first Executive order denying GSP treatment for water buffalo leather from India was issued in 1980. *See* Exec. Order No. 12,204, 45 Fed. Reg. 20,740 (1980). The following year, another order was issued that continued the denial of GSP treatment for water buffalo and certain other Indian leathers. *See* Exec. Order No. 12,302, 46 Fed. Reg. 19,901 (1981).

[25] 570 F. Supp. at 741. The Court also acknowledged that the presence of considerations of foreign relations rendered the President's authority even broader. *See id.* at 742; *see also* South Puerto Rico Sugar Co. v. United States, 334 F.2d 622, 623 (1964) ("a delegation of unusually extensive discretion to the President is not uncommon in the external realm"), *cert. denied*, 379 U.S. 964 (1965).

[26] *See* 747 F.2d 787, 792 (Fed. Cir. 1984).

[27] *See* 570 F. Supp. at 744-46.

[28] *See id.* at 745.

[29] *Id.* (quoting United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940)).

[30] *See* 570 F. Supp. at 746.

[31] 576 F. Supp. at 631.

found to exist.[32] The plaintiffs contended that the President had misinterpreted the term "article" as used in the statute, thereby rendering the removal improper.[33]

Writing for the Court, Judge Watson reasoned that because section 504(c) was cited as the particular source of authority for the President's action, the Court's jurisdiction to review was limited to whether the President's determination conformed to the procedural requirements mandated by the statute.[34] Thus, the Court reviewed the determination for procedural compliance, and held that the President had misinterpreted the term "article."[35] Accordingly, the Court remanded the case to allow the President to make findings consistent with the proper interpretation of the

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[32] *Id.* at 634; *see supra* note 18 and accompanying text.

[33] *See* 576 F. Supp. at 636. The government interpreted "article" under the GSP as a tariff item number, which may "encompass a multitude of separate products." *Id.* at 635. The plaintiffs, however, alleged that to remove an article under the GSP competitive needs formula, the term "article" must be interpreted as a specific product. *Id.* at 633.

[34] *See id.* at 633-34. The Court limited its review of the President's action to his compliance with the authority granted to him under 19 U.S.C. § 2464(c). *See id.* at 633. The *West Bend* court noted that in *Florsheim*, the President acted pursuant to subsections 2464(a) & (c), *see supra* note 22 and accompanying text, but in removing the corn poppers from the list, the President cited § 2464(c) as his sole authority. *See* 576 F. Supp. at 634. In *Florsheim*, the court noted that the President's actions were made subject to his voluntary § 2464(a) authority, and, therefore, not subject to review. *See* 570 F. Supp. at 744. But when the President asserts only § 2464(c) as authority, certain procedural requirements exist, and compliance with these procedures is subject to judicial review. *West Bend*, 576 F. Supp. at 635. Under § 2464(c), the competitive needs formula, the President is compelled to act because certain statutory limitations, such as the 50% limitation, have been met. *See* 576 F. Supp. at 634; *supra* note 18. However, certain statutory exceptions to mandatory Presidential action must be considered before goods are denied preferential treatment. *See* 576 F. Supp. at 634. For instance, the President must consider the exemption of articles that are not "like or directly competitive" with domestically-produced goods. *Id.*; *see* 19 U.S.C. § 2464(d); *supra* note 19. In addition, he may suspend the application of the 50% limit when three conditions exist, namely when:

> (i) there has been an historical preferential trade relationship between the United States and such country,
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> (ii) there is a treaty or trade agreement in force . . . , and
>
> (iii) such country does not discriminate against . . . United States commerce.

19 U.S.C. § 2464(c)(1)(B)(i)-(iii) (1982).

[35] *See* 576 F. Supp. at 636. The court noted that, although the government's interpretation of the term "article" is valid under certain subsections of the GSP, it is clearly not to be applied when removing individual products from duty-free treatment. *See id.* at 635; *supra* note 32; *see also* 19 U.S.C. § 2464(d) (1982). The court reasoned that products should be removed by means of the 50% limitation where the specific good—rather than a group of items in a tariff classification—is competitive with domestic products. *See* 576 F. Supp. at 635. The court held that exclusion of an item number containing a number of products clearly illustrates "that a determination as to the competitive status of the individual products was not made." *Id.* at 636.

term "article"; and, in addition, Judge Watson noted that the subsequent presidential finding would be reviewable only for conformance to the statute and its procedure.[36]

JUDICIAL REVIEW OF GSP ADMINISTRATION

In reviewing executive action under section 504 of the Trade Act, the Court of International Trade, in *Florsheim* and *West Bend*, was cognizant of the long-standing judicial resistance to undermine congressionally delegated Presidential authority in the area of foreign trade.[37] It is settled that when Congress authorizes a public official to take action and grants that officer discretionary authority, the judgment of the officer is subject to the same review as if "Congress itself had exercised that judgment."[38] When foreign affairs are implicated, moreover, the scope of judicial review is further circumscribed.[39]

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[36] *See* 576 F. Supp. at 636.

[37] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936). As long as the congressional delegation of authority provides the President with adequate standards to govern the exercise of the authority, the courts will not interfere. *See Florsheim*, 570 F. Supp. at 741-42. The Supreme Court noted in *Curtiss-Wright Export Corp.* that Congress has enacted numerous statutes authorizing Presidential action in foreign relations that impose less restrictive standards on his judgment than do statutes relating to his domestic powers. 299 U.S. at 324; *see, e.g., id.* at 325-26 (statutory examples).

This judicial abstention is rooted in the principle of separation of powers. *See* Ellis K. Orlowitz Co. v. United States, 200 F. Supp. 302, 305 (Cust. Ct. 1961), *aff'd*, 50 C.C.P.A. 36 (1963). The *Ellis* court noted that "judicial noninterference in legislative authority constitutionally conferred by Congress on the executive," is a well-recognized rule, and therefore, refused to inquire into the discretion exercised by the President in an anti-dumping action. *Id.* The President's performance of discretionary duties is not within the province of judicial inquiry. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 171 (1803) (dictum).

[38] United States v. George S. Bush & Co., 310 U.S. 371, 380 (1940). In *Bush*, the Court of Customs and Patent Appeals held invalid a Presidential proclamation increasing the duty on canned clams imported from Japan. George S. Bush & Co. v. United States, 104 F.2d 368, 374 (C.C.P.A. 1939). On appeal, the Supreme Court reversed, 310 U.S. at 380, holding that where Congress authorizes a public officer to act when, in his judgment, action is necessary, this action is reviewable to the same extent as is an act of Congress, *id.*

[39] South Puerto Rico Sugar Co. v. United States, 334 F.2d 622, 631 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965). In *South Puerto Rico Sugar Co.*, the Secretary of Agriculture, under a statutory formula, determined sugar quotas for all sugar-importing countries. 334 F.2d at 624. The President was empowered by Congress to reduce the Cuban sugar allotment, replace it with sugar from other countries, and impose upon those countries " 'such terms and conditions as he deem[ed] appropriate.' " *Id.* (quoting Act of July 6, 1960, Pub. L. No. 86-592, 74 Stat. 330); *see also supra* note 6. *But cf.* Zemel v. Rusk, 381 U.S. 1, 17, 18 (1965) (dictum) (a statute cannot grant the President "totally unrestricted freedom of choice" simply because it deals with foreign relations).

Historically, United States trade policy has been characterized by a large measure of executive autonomy. *See* Field v. Clark, 143 U.S. 649, 690-94 (1892). In *Field*, the Supreme

The Supreme Court outlined the role of judicial review of executive action in international trade in *United States v. George S. Bush & Co.*[40] The *Bush* Court noted that the reviewing court should: first, determine whether the President's action is within his congressionally delegated authority; second, examine whether there has been a proper understanding and application of the statute; and, third, decide whether the President complied with statutory procedures.[41] Consequently, the permissible range of review by the Court of International Trade does not extend to discretionary actions taken by the President pursuant to section 504(a).[42] Nevertheless, it does include review of statutorily mandated procedural actions taken by the President pursuant to section 504(c).[43] Therefore, it is submitted that the Court in *Florsheim* and *West Bend* properly refused to broaden its jurisdiction to include an area that

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Court summarized its recognition of the sensitive nature of foreign trade when it stated that it is "often desirable, if not essential, . . . to invest the President with large discretion in matters arising out of . . . trade and commerce with other nations." *Id.* at 691. The Court affirmed its holding several decades later when it held that the President must be accorded "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 118-120 (1972) (Congress and President act concurrently in realm of foreign affairs). The power to conduct foreign relations is vested in the President, *see* U.S. CONST. art. 2, and although the power to regulate commerce is a legislative function, Congress may delegate to the President the constitutional power to regulate foreign commerce, *Curtiss-Wright Corp.*, 299 U.S. at 327-28. For a discussion of the reasons for allowing the President broad powers in this area, *see id.* at 319-21.

[40] 310 U.S. 371 (1940).

[41] *See id.* at 379; *see also Florsheim*, 570 F. Supp. at 743. In determining the extent of judicial power to review the executive determination, the Court found that it was limited to reviewing for procedural compliance. *See Bush*, 310 U.S. at 379. The courts should only consider the President's compliance with congressional standards. *See, e.g.*, Farr Man & Co. v. United States, 544 F. Supp. 908, 910 (Ct. Int'l Trade 1982) (Presidential proclamation imposing sugar duties held reviewable to determine whether President exercised his authority in conformity with statutory procedural requirements); Ellis K. Orlowitz Co. v. United States, 200 F. Supp. 302, 305 (Cust. Ct. 1961) (court refused to inquire into Presidential finding of treatment harm in anti-dumping proclamation); *cf.* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31-32 (1827) (when a statute gives discretionary power, that person is "sole and exclusive judge" of existing facts). The Court of International Trade has held that when the President relies on a statute authorizing his action, "the role of the judiciary is at an end." American Ass'n of Exporters & Importers v. United States, 583 F. Supp. 591, 598 (Ct. Int'l Trade 1984) (quoting United States Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399, 404 (1982)). In *American Ass'n of Exporters*, the Court determined that the President's action imposing restrictions on imported textiles was not reviewable, *American Ass'n of Exporters*, 583 F. Supp. at 598-99 & 599 n.10, because he relied on a statute that granted him extraordinary discretion in negotiating textile trade agreements, *id.* at 598.

[42] *See supra* notes 23-24 and accompanying text.

[43] *See supra* note 33 and accompanying text.

Congress has specifically granted to the President. Nonetheless, it is further suggested that this virtually unfettered discretion accorded the President and his administering agents works to thwart the effectiveness of the United States GSP program by adding an element of uncertainty to its application. This Comment will examine why LDC trade programs warrant less discretionary authority and will propose a solution to be adopted by Congress.

PRESIDENTIAL DISCRETION AND GSP GOALS

It has been suggested that the broadly defined discretionary authority accorded the President in the administration of the program leads to diminished confidence in the United States GSP.[44] In a program where administrative hearings and reports on the status and eligibility of goods and countries are confidential, and where the President may exercise his authority under section 504(a) without threat of judicial inquiry, LDCs may perceive the program as a political tool rather than as a developmental aid.[45] As enunciated in *Florsheim*, the purpose of enacting a GSP was to further LDC economic development.[46] However, it is proposed that the goals of the program are frustrated by the injection of arbitrary elements into the administration of the program, since few LDC governments and private investors are willing to risk long-term investment to create industrial capacity to produce goods presently eligible for GSP treatment. Investment in nontraditional industries is vital to economic diversification and to the success of the GSP.[47]

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[44] *See* Lahoud, *supra* note 2, at 26, 28. The use of Presidential discretion in eligibility determinations leads to diminished confidence in the program because it injects "arbitrary and discriminatory criteria" into the administration of the program. *Id.*

[45] *See, e.g.*, Lahoud, *supra* note 2, at 27 (LDCs fear Presidential discretion equals political coercion); *GSP Hearings*, *supra* note 6, at 57 (statement of Julius Kaplan, Kaplan Russin & Vecchi) (confidential ITC decisions should be "made in the sunshine"); *GSP Hearings*, *supra* note 6, at 39 (statement of Howard D. Samuel, President, Industrial Union Department, A.F.L.-C.I.O.) (GSP program can and should be administered in a more open manner). The high degree of administrative discretion may have arisen because agency review is encumbered by statutory and procedural ambiguities and imprecise standards for determining GSP eligibility. Lahoud, *supra* note 2, at 30. The lack of documented reports and the limited publicity attempts discourage participation in the GSP as well. *Id.* at 31.

[46] *See* 570 F. Supp. at 736; *supra* notes 1-3 and accompanying text. In addition to spurring development by LDCs, the GSP program recognizes the fast growing LDC market for United States goods. *See GSP Hearing*, *supra* note 6, at 11 (statement of Doral Cooper, Deputy Assistant United States Trade Representative).

[47] *See GSP Hearing*, *supra* note 6, at 54 (statement of Ted Rowland, American Importers Association). Foreign and domestic investment, as well as LDC industrial-economic planning is dependent upon future tariff treatment for LDC-manufactured goods. *See id.*;

Under the present system, however, if an entrepreneur or the LDC government invests in a plant to produce certain items currently eligible for GSP treatment, and the President subsequently removes that item from the GSP list pursuant to section 504(a), substantial losses will be incurred.[48] The situation is further aggravated because the determination would not be reviewable.[49] Therefore, to strengthen the usefulness and importance of the program, it is urged that the GSP should be "depoliticized" by requiring the President to consider and document more precise standards before altering GSP eligibility. Considering the established precedent of judicial noninterference in foreign trade decisions,[50] it is further suggested that the President's discretion should be limited by legislative action.

An example of a congressional limitation on presidential discretion in an LDC economic and trade program is the recently enacted Caribbean Basin Initiative (CBI).[51] The CBI requires that certain criteria be satisfied before any Presidential action may be taken.[52] The CBI is a development program designed for the specific needs of the nations of the Caribbean Basin, which, similar to the GSP, combines trade and investment to spur economic growth in the targeted LDCs.[53] With provisions delegating authority to the President to administer the program and to determine the beneficiary countries and eligible articles,[54] the "duty-free treatment" subtitle of the CBI[55] has the same format as the GSP. The major

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see also infra note 52.

[48] *See, e.g.*, Lahoud, *supra* note 2, at 24-25 (uncertainty about the future of GSP deters investment).

[49] *See supra* note 23 and accompanying text.

[50] *See supra* note 36 and accompanying text.

[51] Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, §§ 201-233, 97 Stat. 384 (1983) (codified at 19 U.S.C.A. §§ 2701-2706 & scattered sections of 26 U.S.C.A.) (Supp. 1984)).

[52] *See id.*

[53] *See* Waldmann, *Economic Development*, 12 CAL. W. INT'L L.J. 456, 462-63 (1982). The Caribbean Basin Initiative (CBI) is designed to respond to regional economic problems through long-term economic development. *The Administration's Proposed Trade and Tax Measures Affecting the Caribbean Basin, Hearings on H.R. 5900 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 3 (1982) [hereinafter cited as *CBI Hearings*] (statement of Ambassador William E. Brock). In drafting the CBI, Congress recognized that an investor needs a realistic time period to recoup his investment and to insure a long-term market for his product and, therefore, the CBI includes complementary tax and investment incentives. *CBI Hearings*, *supra*, at 25 (statement of Raymond Waldmann, Assistant Secretary of Commerce for International Economic Policy).

[54] 19 U.S.C.A. §§ 2701-2703 (Supp. 1984).

[55] Caribbean Basin Economic Recovery Act, §§ 201-218, 19 U.S.C.A. §§ 2701-2706

difference between the GSP and the parallel CBI provisions is that the latter provide more guidance for the administration of the program.[56] For example, the GSP provides four criteria for presidential designation of a beneficiary LDC, while the CBI contains eleven.[57] Furthermore, unlike the corresponding GSP section, the CBI provides guidelines for promulgation of regulations by the Secretary of the Treasury for the eligibility of articles for duty-free treatment under the CBI.[58] In addition, although the value-added requirements for item eligibility under both programs are identical,[59] the CBI includes both definitions of the key terms and examples of what is included and what is excluded.[60]

(Supp. 1984).

[56] *See infra* notes 56-67.

[57] *Compare* 19 U.S.C.]]2462(c)(1)-(4) (1982) *and supra* note 5 (GSP provisions), *with* 19 U.S.C.A. § 2702(c)(1)-(11) (Supp. 1984) (CBI provisions). The CBI criteria include the degree to which the country affords reasonable working conditions and the right of workers to organize, 19 U.S.C.A. § 2702(c)(8) (Supp. 1984), and the extent to which the LDC provides for acquisition and enforcement of copyrights, *id.* § 2702(c)(9).

[58] *Compare* 19 U.S.C. § 2463(b)(2) (1982) (GSP provisions) *with* 19 U.S.C.A. § 2703(a)(2) (Supp. 1984) (CBI provisions). The GSP provides that the Secretary of the Treasury "shall prescribe such regulations as may be necessary to carry out" the program, while the CBI, in addition to the above language, includes examples to guide the Treasury Department. According to the CBI, the rules should include, but not be limited to, regulations requiring that:

> [I]n order to be eligible for duty-free treatment under this chapter, an article must be wholly the growth, product, or manufacture of a beneficiary country, or must be a new or different article of commerce which has been grown, produced, or manufactured in the beneficiary country . . . .

19 U.S.C.A. § 2703(a)(2) (Supp. 1984). The CBI also includes examples of regulations that should be prescribed to prevent certain articles from becoming eligible. *See id.*

[59] *See, e.g.*, 19 U.S.C. § 2463(b)(2) (1982) (GSP value-added rule); 19 U.S.C.A. § 2703(a)(1) (Supp. 1984) (CBI value-added rule). Both the GSP and the CBI provide that not less than 35% of the appraised value of an article be added by the LDC through the sum of "the cost of value of the materials produced" in the LDC plus "the direct cost of processing operations" performed in the LDC. *See* 19 U.S.C. § 2463(b)(2) (1982); 19 U.S.C.A. § 2703(a)(1) (Supp. 1984).

[60] *See, e.g.*, 19 U.S.C.A. § 2703(a)(3) (Supp. 1984). Section 2703(a)(3) provides:

> [T]he phrase "direct costs of processing operations" includes, but is not limited to—
>
> (A) all actual labor costs involved in the growth, production, manufacture, or assembly of the specific merchandise, including fringe benefits, on-the-job training and the cost of engineering, supervisory, quality control, and similar personnel; and
>
> (B) dies, molds, tooling, and depreciation on machinery . . . .
>
> Such phrase does not include costs which are not directly attributable to the merchandise concerned or are not costs of manufacturing the product, such as (i) profit, and (ii) general expenses of doing business . . . [nor] administrative salaries, casualty and liability insurance, advertising . . . .

The CBI also imposes upon the President an affirmative duty to avoid suspension of preferential treatment.[61] For example, in order to meet the unique needs of the region, the CBI has special provisions for sugar and beef products that require the beneficiary LDC to establish a stable food production plan if it chooses to export duty-free sugar or beef to the United States.[62] The statute provides that duty-free treatment for sugar and beef products must be suspended if the LDC does not submit a food production plan, or if it submits a plan not in compliance with one previously submitted.[63] This suspension provision in the CBI can be compared to the mandatory suspension provisions in the GSP.[64] The difference is that the CBI suspension provisions obligate the President, before revoking the duty-free treatment of sugar or beef, to offer to consult with the LDC in an attempt to avoid the suspension.[65] It is submitted that this affirmative duty ensures that the United States will work to continue a country's participation in the program, and thereby decreases the arbitrary nature of the tariff scheme.

Lastly, the CBI contains a section that exemplifies the curtailment of executive discretion advocated by this Comment.[66] While the GSP provides the President with virtually limitless power to withdraw or suspend the duty-free treatment of any article,[67] the CBI allows suspension only to prevent serious injury to industry in

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Id.

[61] *See* 19 U.S.C.A. § 2703(c) (Supp. 1984).

[62] *Id.* § 2703(c)(1)(B). A food production plan must be submitted by each LDC that intends to participate in the duty-free exportation of beef and sugar to the United States. *Id.* This requirement is designed to ensure that changes in land use that were implemented to take full advantage of this program do not adversely affect the balance of food production in that country. *See id.*

[63] *Id.* § 2703(c)(2).

[64] *See* 19 U.S.C. § 2464(c) (1982) (competitive needs limitations); *see also supra* note 18 and accompanying text. The suspension provisions of the CBI are limited to suspension of duty-free treatment of sugar and beef; therefore, there are no competitive needs types of limitations on other eligible items from the beneficiary Caribbean Basin countries. *See* 19 U.S.C.A. § 2703(d) (Supp. 1984) (limits on sugar and beef imports).

[65] 19 U.S.C.A. § 2703(c)(3) (Supp. 1984). Before ordering a suspension of preferential treatment for sugar and beef, the President "must offer to enter into consultation with the beneficiary country for [the] purposes of formulating appropriate remedial action . . . to avoid such suspension." *Id.* The statute also obligates the President to monitor the food plans implemented by the LDCs and to submit biennial progress reports to Congress. *See id.* § 2703(c)(4).

[66] *See* 19 U.S.C.A. § 2703(e)(1), (2) (Supp. 1984).

[67] 19 U.S.C. § 2464(a) (1982).

the United States, or to safeguard national security.[68]

CONCLUSION

In reviewing presidential determinations in foreign trade programs, the courts are limited to an examination of procedural regularity that does not extend to a review of the President's discretion. Therefore, it is the responsibility of Congress to enact statutes that outline for the President, the LDCs, and the investment community the criteria that determine when a country or good is eligible to receive duty-free treatment, and which factors determine the withdrawal or suspension of such preferential treatment.

A current trend in LDC economic plans is the growth of regional cooperation through economic communities or trade associations.[69] It is therefore suggested that policymakers consider working with these associations to tailor development programs to the special needs and goals of specific LDC regions and, together, establish comprehensive guidelines for their effective administration. Congress has begun this integrated trade, aid, and investment approach with the CBI. It is urged that Congress continue to design and implement similar programs that address the problems endemic to an LDC region.

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[68] 19 U.S.C.A. § 2703(e)(1) (Supp. 1984). Section 2703(e)(1) authorizes the President to suspend duty-free treatment "pursuant to section 230 of the Trade Act of 1974," 19 U.S.C. § 2253 (1982), or "section 232 of the Trade Expansion Act of 1962," 19 U.S.C. § 1862 (1982). *See* 19 U.S.C.A. § 2703(e)(1) (Supp. 1984). Specifically, action under the Trade Act requires a finding by the President that such is necessary to "prevent or remedy a serious injury or threat thereof to the industry in question." 19 U.S.C. § 2253(a) (1982). Section 232 of the Trade Expansion Act empowers the President to act to safeguard national security. *See id.* § 1862(a) (1982).

[69] *See* Vaky, *Political and Economic Aspects: How to Think About Latin America*, 12 CAL. W. INT'L L.J. 403, 418 (1982). Examples of regional economic communities include ASEAN (Indonesia, Malaysia, Philippines, Singapore, Thailand), Andean Group (Bolivia, Colombia, Ecuador, Peru, Venezuela), and CARICOM (Antigua, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Trinidad and Tobago). *See* 1 P. FELLER, *supra* note 4, at 11-32; Dundas, *Legal, Practical and Customs Problems Facing Trade Between the United States and the Caribbean Community*, 4 INT'L TRADE L.J. 85, 85 & n.2 (1978).